IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 96-2440

FEDERAL TRADE COMMISSION

Plaintiff-Appellant

v.

BUTTERWORTH HEALTH CORPORATION, a Michigan corporation;
BLODGETT MEMORIAL MEDICAL CENTER, a Michigan corporation

Defendants-Appellees

On Appeal from the United States District Court
for the Western District of Michigan
Case No. 1:96-CV-49

REPLY BRIEF FOR PLAINTIFF-APPELLANT FEDERAL TRADE COMMISSION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE DISTRICT COURT COMMITTED LEGAL ERROR IN DENYING INJUNCTIVE RELIEF ON GROUNDS THAT THE SUBSTANTIAL LESSENING OF COMPETITION THAT IT FOUND THE MERGER WOULD CAUSE WAS SOMEHOW GOOD FOR CONSUMERS 4

II. THERE IS NO COGNIZABLE BASIS FOR THE COURT'S BELIEF THAT ELIMINATING MEANINGFUL HOSPITAL COMPETITION IN GRAND RAPIDS WOULD BENEFIT CONSUMERS 7

A. Hospital Competition in Grand Rapids Has Given Consumers the Benefit of Two Highly Efficient, High Quality, Reasonably-Priced, Full-Service Hospitals 7

B. The Nonprofit Status of the Merging Parties Does Not Support a Conclusion that Eliminating Meaningful Hospital Competition in Grand Rapids Will Benefit Consumers 9

C. There Is Substantial Customer Opposition to the Merger and Employer Support, Hardly "Overwhelming," Stems from Hostility to Competition 12

D. The Community Commitment Is No Substitute for Competition 14

E. Neither the Court's Nor Defendants' Efficiencies Discussion Shows that the Merger Would "Benefit Competition and Hence Consumers" 16

III. THE COMMISSION'S STRONG SHOWING ON THE MERITS, AS WELL AS THE EQUITIES, WARRANT ENTRY OF A PRELIMINARY INJUNCTION . . . 22

CONCLUSION 25

CERTIFICATE OF SERVICE

DESIGNATION OF ADDITIONAL APPENDIX CONTENTS

TABLE OF AUTHORITIES

Cases:

Balmoral Cinema v. Allied Artists Pictures Corp., 885 F.2d 313 (6th Cir. 1989) 5

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 4

FTC v. Dean Foods, 384 U.S. 597 (1966) 24

FTC v. Elders Grain, Inc., 868 F.2d 901 (7th Cir. 1989) 23, 24

FTC v. Exxon Corp., 636 F.2d 1336 (D.C. Cir. 1980) 24

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) 13

FTC v. PPG Industries, Inc., 798 F.2d 1500 (D.C. Cir. 1986) 23

FTC v. Procter & Gamble Co., 386 U.S. 568 (1967) 21

FTC v. University Health, Inc., 938 F.2d 1206 (11th Cir. 1991) . . . . passim

Hospital Corp. of America v. FTC, 807 F.2d 1381 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987) 7

In re Adventist System/West, 5 Trade Reg. Rep. (CCH) ¶ 23,591 (FTC Apr. 1, 1994) . . 24

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 5, 6

NCAA v. Board of Regents, 468 U.S. 85 (1984) 8, 9, 16

Northern Pacific R. Co. v. United States, 356 U.S. 1 (1958) 8

PSI Repair Services, Inc. v. Honeywell, Inc., 1997 Fed. App. 0008P (6th Cir.). 1

United States v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990) 7

United States v. Country Lake Foods, 754 F. Supp. 669 (D. Minn. 1990) 18

United States v. E.I. duPont DeNemours & Co., 353 U.S. 586 (1957) 4

United States v. Mercy Health Services, 902 F. Supp. 968 (N.D. Iowa 1995), appeal pending, No. 95-4253 (8th Cir.) 19

United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 4, 6

United States v. Rockford Memorial Corp., 717 F. Supp. 1251 (N.D. Ill. 1989), aff'd, 898 F. 2d 1278 (7th Cir.), cert. denied, 498 U.S. 920 (1990) 19

United States v. Rockford Memorial Corp., 898 F.2d 1278 (7th Cir.), cert. denied, 498 U.S. 920 (1990) 1, 7, 9

Statutes:

Clayton Act, 15 U.S.C. §§ 12 et seq.

Section 7, 15 U.S.C. § 18 . . . . passim

Section 7A, 15 U.S.C. § 18A 25

Section 11(c), 15 U.S.C. § 21(c) 22

Federal Trade Commission Act, 15 U.S.C. §§ 41 et seq.

Section 13(b), 15 U.S.C. § 53(b) 22-24

Sherman Antitrust Act, 15 U.S.C. §§ 1 et seq. 4-6

Miscellaneous:

Areeda & Hovenkamp, Antitrust Law (Supp. 1996) 6

Department of Justice Antitrust Division/Federal Trade Commission, Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992) 17

Department of Justice and Federal Trade Commission, Statements of Antitrust Enforcement Policy in Health Care (Enforcement Policy on Mergers Among Hospitals), 4 Trade Reg. Rep. (CCH) ¶ 13,153 (1996) 19

Dranove et al., "Price and Concentration in Hospital Markets: The Switch from Patient-Driven to Payer-Driven Competition," 36 Journal of Law and Economics 179 (1993) 10

Gruber, "The Effect of Competitive Pressure on Charity: Hospital Responses to Price Shopping in California," 13 Journal of Health Economics 183 (1994) 10

"Demise of the Not-for-Profit Has Been Greatly Exaggerated," Modern Healthcare 33 (Dec. 23, 1996) 9

Simpson & Shinn, "Do Nonprofit Hospitals Exercise Market Power?" FTC Bureau of Economics Working Paper No. 214 (Dec. 1996) 10

S. Rep. No. 1775, 81st Cong., 2d Sess., 1950 U.S. Code Cong. & Adm. News 4296 5

INTRODUCTION AND SUMMARY OF ARGUMENT

The merger that the Commission seeks to enjoin preliminarily (pending an administrative trial on the merits) combines the two-preeminent hospitals in Michigan's second-largest city. Butterworth and Blodgett are each other's only significant competitors in a market of more than 500,000 people. Managed care providers, indemnity insurers, and even those employers who support this merger, agree that they must provide access to one of these two hospitals to gain consumers' patronage. The district court thus found, and defendants do not dispute, that the merger of Butterworth and Blodgett would without question give the merged entity, acting alone, "substantial market power in two relevant markets." (R.200 Op. 41, APX 73.)

Never before this case has a court held -- for any reason -- that a merger between two efficient, profitable competitors that left a single firm with market power was lawful under the Clayton Act. By any commonly understood meaning of the term "competition," the likely effect of this merger, on the preliminary injunction record compiled below, "may be substantially to lessen competition," within the meaning of Section 7 of the Clayton Act 15 U.S.C. § 18, which sets the standard by which the legality of the merger will ultimately be judged. In antitrust terms, this merger creates an effective monopoly -- a single firm with power to impose its will on the marketplace.[1] The issue in this case is not, therefore, "whether the size of the ultimate market share should preclude the proposed merger" (Br. 2), or whether defendants successfully rebutted a prima facie case based only on concentration levels (id. at 4).[2] Rather, as the district

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[1] Although a merged Butterworth/Blodgett would not have 100% of the market, it would have the power to set prices unilaterally and its market share would "approach[], perhaps exceed [] a common threshold of monopoly power -- two thirds," United States v. Rockford Memorial Corp., 898 F.2d 1278, 1285 (7th Cir.), cert. denied, 498 U.S. 920 (1990); PSI Repair Services, Inc. v. Honeywell, Inc., 1997 Fed. App. 0008P at 9 (6th Cir.).

[2] Defendants' brief will be cited as "Br." Briefs amicus curiae for the Commission were filed by the Attorneys General of 26 States ("AG Br."), the American Association of Health Plans ("AAHP Br."), and the Consumer Federation of America ("CFA Br."). Briefs for defendants were filed by the American Hospital Association ("AHA Br."), VHA, Inc. and Volunteer

court found, the Commission's proof went far beyond a "statistical argument" (VHA Br. 5), to show both that the acquisition would give defendants single-firm market power, and that defendants would use that power to impose what they, rather than the marketplace, decide are appropriate levels of price, quality, and service.

In advocating denial of the preliminary injunction, defendants asserted, and the court agreed, that "even though competition may be lessened, the interests of consumers are * * * likely to be advanced" by the merger (R. 200 Op. 40, APX 72). To reconcile this formulation with the Clayton Act's unqualified prohibition of mergers that may substantially lessen "competition," defendants argue on appeal that "competition" itself has no meaning independent of a court's idiosyncratic assessment of consumer welfare. In defendants' view, if a court decides that a single firm with market power is somehow good for consumers, then a merger that creates that monopoly does not "substantially lessen competition." This is not the law. The antitrust laws seek to promote consumer welfare by the statutory requirement that competition be preserved. The court's role in a merger case, therefore, is only to decide whether the merger is likely to lessen competition substantially. Congress has already decided that lessening of competition harms consumers. (**POINT I.**)

Even if it were the court's place to decide whether the substantial lessening of competition threatened by the merger would be good for consumers, the record shows that competition between the two pre-eminent firms in the Grand Rapids hospital market has benefited consumers, and defendants have shown no cognizable reason to conclude that eliminating such competition would benefit consumers more. As our opening brief demonstrated (without contradiction by defendants), competition between Butterworth and Blodgett, like competition between most rivals, has caused these firms to offer or consider offering price reductions to buyers, to pursue cost-

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Trustees of Not-for-Profit Hospitals ("VHA Br.") and Healthcare 2000 ("HC2000 Br.").

reduction initiatives to fund such competition, and to offer consumers a choice of facilities providing a full range of high quality medical care. Defendants' brief, like the court's opinion, assigns no value to these benefits of competition that the merger will erase. (**POINT II.A.**)

Defendants' own assessment of the merger's impact on consumers, like the court's, rests on a series of novel contentions that do not rebut the Commission's strong demonstration of the merger's anticompetitive effects. Defendants' claim that single-firm market power is not harmful when exercised by nonprofit hospitals has been repeatedly rejected in merger cases and remains unproven on this record. (**POINT II.B.**) Support for the merger by some large Grand Rapids employers (who exhibit the same aversion to competition that motivates defendants) cannot outweigh the opposition of health care plans and other employers who collectively provide insurance to far more consumers than do the merger's supporters. (**POINT II.C.**) Even assuming erroneously that a court may substitute judicial price-regulation for competition in a Clayton Act case, the vague, temporary promises in the "Community Commitment" allow for pricing well above what continued rivalry between Butterworth and Blodgett could produce. (**POINT II.D.**) And defendants' efficiencies defense is unavailing because defendants, like the court below, fail to address, among many other things, how the alleged efficiencies will "benefit competition and hence consumers." (**POINT II.E.**)

Given the Commission's strong showing of a likely lessening of competition, "rebutted" (in the district court's view) only by defenses that are surely novel at best, this case plainly presents the "serious, substantial, difficult and doubtful" questions going to the merits that Congress prescribed should be resolved in the FTC's administrative proceeding, with the aid of a preliminary injunction from the court. Defendants' threat to abandon a presumptively unlawful merger if it is enjoined is no reason to withhold relief. Implementation of defendants' post-merger plans may make divestiture impossible, and they have not offered to delay those plans while the administrative hearing proceeds. Relief is needed to prevent interim harm to competition and to assure that the merits proceeding does not become a hollow exercise. (**POINT III**.)

ARGUMENT

I. THE DISTRICT COURT COMMITTED LEGAL ERROR IN DENYING INJUNCTIVE RELIEF ON GROUNDS THAT THE SUBSTANTIAL LESSENING OF COMPETITION THAT IT FOUND THE MERGER WOULD CAUSE WAS SOMEHOW GOOD FOR CONSUMERS.

The antitrust laws, including the Clayton Act, reflect a determination by Congress to promote the goal of consumer welfare by expressly mandating the preservation of competition. The court's role in a Clayton Act case, therefore, is only to decide whether the effect of the challenged transaction "may be to substantially lessen competition." Effect on competition is the sole standard by which the law measures a transaction, not one factor among many to be weighed by the court. United States v. Philadelphia National Bank, 374 U.S. 321, 371 (1963). The district court's conclusion that a merger creating a single firm with unquestioned market power should be allowed "even though competition may be lessened" was therefore reversible error.

Defendants seek to obscure the distinction between the underlying statutory goal (to promote consumer welfare) and the exclusive mandated statutory method for achieving that goal (promoting competition), by arguing that Sherman Act "[r]ule of reason treatment," whatever its relevance to a merger case,[3] "does not permit separation of the process of competition from its likely effect (or lack of effect) on price, quality or output" (Br. 9). In defendants' view, the

[3] When it enacted the Clayton Act, Congress "intended to reach incipient monopolies and trade restraints outside the scope of the Sherman Act," Brown Shoe Co. v. United States, 370 U.S. 294, 318, n. 32 (1962); see also United States v. E.I. duPont De Nemours & Co., 353 U.S. 586, 589 (1957); S. Rep. No. 1775, 81st Cong., 2d Sess. at 4-5, reprinted in 1950 U.S. Code Cong. and Adm. News 4296 ("[t]he intent [of Section 7] is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding").

district court therefore acted within the bounds of its factfinding authority in denying relief because the Commission failed to persuade the court "that prices to consumers were likely to increase as a result of the proposed merger" (id. at 12). The only reason, however, why the court (apparently) believed that prices would not be unfavorably affected by the merger was that Butterworth/Blodgett would benevolently exercise its unquestioned market power (subject to court supervision under the Community Commitment) to maintain reasonable charges. The pricing mechanism contemplated by the court does not preserve "competition" within any possible meaning of the term under Section 7 of the Clayton Act (which governs here), or under the Sherman Act's rule of reason. The court's faith in regulated hospital monopolies to surpass the results of competition is unsupported by the record (Part II, infra), but even if it were supported, the Supreme Court's precedents

> foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. That kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries, but it is not permitted by the Rule of Reason.

National Soc'y of Prof. Engineers v. United States, 435 U.S. 679, 689-90 (1978) (citations omitted).

There is no doubt, as some of the rule of reason cases cited by defendants at Br. 9-10 illustrate, that in assessing a practice whose impact on competition is uncertain or ambiguous, a court may directly assess its effect on consumers.[4] But that does not mean, as defendants would

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[4] In the typical rule of reason case, this principle comes into play where an agreement between or among competitors both restricts and enhances competition at the same time, such as the "group buying program" in Balmoral Cinema v. Allied Artists Pictures Corp., 885 F.2d 313, 317 (6th Cir. 1989). In such a case, a court may need to examine the impact on consumers to assess a practice's net effect on competition. But this does not mean that a court may condone a practice that unambiguously damages competition merely because the court believes that competition harms consumers. As the Supreme Court observed in another rule of reason case, "The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers." National Soc'y of Prof. Eng'rs, 435 U.S. at 695-96.

have it, that the statutory term "competition" used in the Clayton Act has no meaning apart from a court's personal view of what economic system (e.g., meaningful rivalry among independent firms, regulated monopoly, private socialism) is best for consumers in a particular industry or market. In this case, the Commission's proof went far beyond the "prima facie" statistical case portrayed by defendants and their amici, and left little doubt (even in the district court's mind) about the effect of this merger on "competition."[5] Beyond showing that the merger would give defendants a large share of well-defined antitrust markets (the "prima facie" case, see United States v. Philadelphia National Bank, 374 U.S. at 363), the Commission demonstrated that the other (much smaller) hospitals in Grand Rapids and outlying rural areas were not viewed as meaningful alternatives to Butterworth and Blodgett by major health care purchasers, with the result that the merged entity, acting alone, would have "market power."[6] The court also found that barriers to entry into the relevant markets are very high (R.200 Op. 29, APX 61), so that if the new health-care monolith charged supracompetitive prices, there would be no real possibility that another firm could enter to challenge it.[7] And defendants themselves have acknowledged that

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[5] Indeed, most of defendants' own witnesses supported the merger because they did not believe that competition worked in the hospital industry. See pp. 12-14, infra.

[6] Defendants find it "notable" that "this transaction does not represent a merger to monopoly and will not eliminate all competition" (Br. 34 n.27), but the district court found that the remaining small Grand Rapids hospitals could not constrain price increases by a combined Butterworth/Blodgett "due to the greater range of services and the perceived higher quality of care available at defendant hospitals" (R.200, Op. 29, APX 61). The accretion of such single-firm market power is what is "notable" about this case. See Areeda & Hovenkamp, Antitrust Law ¶ 901a at 740-741 (1996 Supp.) (mergers that create a "post-merger firm" able to "so dominate the market as to control price" are today "quite rare"). It is also, therefore, beside the point whether the merger would enhance the ability of Butterworth/Blodgett to collude or coordinate pricing with the two small hospitals remaining in Grand Rapids, which is the issue in most merger cases (id.). The district court did not address this question and we do not pursue it here (compare Defs. Br. 13), because the court's findings make clear that Butterworth/Blodgett would have no need to collude or coordinate pricing with anyone to work its will on the post-merger marketplace.

[7] This evidence of anticompetitive effects to supplement market share statistics is precisely the type of showing that the court found lacking in United States v. Baker Hughes, Inc., 908 F.2d

they plan to act like a (loosely regulated) monopolist after the merger, reaping guaranteed "upper quartile" margins and imposing on the marketplace what the new Hospital decides are fair prices under the "Community Commitment."

These facts, found by the court and not contested by the defendants in their brief, far surpass the evidence of competitive restraint recited in other cases in which hospital mergers have been condemned. See FTC v. University Health, Inc., 938 F.2d at 1218-19; United States v. Rockford Memorial Corp., 898 F.2d 1278 (7th Cir.), cert. denied, 498 U.S. 920 (1990); Hospital Corp. of America v. FTC, 807 F.2d 1381 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987). The court denied an injunction not because it found that competition would not be substantially lessened, but because the court believed that consumers would benefit from the merger "even though competition may be lessened." Affirmation of that result cannot be reconciled with the Clayton Act or the appellate and Supreme Court cases construing it.

II. THERE IS NO COGNIZABLE BASIS FOR THE COURT'S BELIEF THAT ELIMINATING MEANINGFUL HOSPITAL COMPETITION IN GRAND RAPIDS WOULD BENEFIT CONSUMERS.

A. Hospital Competition in Grand Rapids Has Given Consumers the Benefit of Two Efficient, High Quality, Reasonably-Priced Full-Service Hospitals.

Although it was not the Commission's burden to re-prove the value of competition in this case, our opening brief showed, and defendants do not contest, that competition between Butterworth and Blodgett has produced many of the very types of benefits that underlie the

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981 (D.C. Cir. 1990), on which defendants and VHA inappositely rely (Br. 11-12; VHA Br. 6-7). In Baker Hughes the court looked to such factors as entry barriers and the meaningfulness of market share statistics (which the court found "volatile and shifting" (908 F.2d at 986)). Injunctive relief was denied because the court concluded that the government had not shown that competition would be substantially lessened in the post-merger market, not because the court decided that eliminating competition would benefit consumers.

antitrust laws' "premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." NCAA v. Board of Regents, 468 U.S. 85, 104 n.27 (1984), quoting Northern Pacific R. Co. v. United States, 356 U.S. 1, 4-5 (1958).

Competition between Butterworth and Blodgett has given the residents of Grand Rapids two of "the most efficient and best run hospitals in the state, if not the nation" (Br. 24). Because of competition, Grand Rapids consumers enjoy a choice of high-quality full-service hospital care, and large health care purchasers may pursue price reductions that can be passed on to consumers.[8] The record shows that such price reductions were given initially to managed care organizations, but defendants offer no reason why self-insuring employers could not seek similar reductions, and they nowhere explain why this "spillover" effect in a competitive environment (see FTC Br. 29; AAHP Br. 10-11) should not be expected to produce lower overall prices than defendants would impose by fiat. Indeed, as our opening brief noted, Butterworth and Blodgett have already planned or begun to offer price reductions to self-insured employers (FTC Br. 29), a fact confirmed by amicus Healthcare 2000 (HC2000 Br. 8).[9]

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[8] Defendants assert that the Commission has never suggested that the output of "necessary" health services would be reduced as a result of this merger (Br. 13). It is obvious, however, that the merger will eliminate any choice of perceived quality, location, and other features that consumers now enjoy between two full-service hospitals, leaving defendants rather than the marketplace to decide what level of output and quality is "necessary" (and desirable) for the community.

[9] Defendants' brief attempts alternatively to minimize the extent of competitive discounting while deriding that which does occur as baneful "cost-shifting" (Br. 22-23). Defendants never explain, however, why the give and take of pricing in the hospital industry is different from that in any other competitive market. Every day, thousands of sharp consumers buy new automobiles at large discounts by threatening to buy elsewhere, while less determined individuals pay hundreds or thousands of dollars more for the very same make and model cars. No one would suggest that the solution to this "problem" (if it is one) is a merger of all the automobile dealers in a city who could then charge everyone the same price. Complaints about price variability are particularly untenable in hospital markets, like Grand Rapids, where most or all payors are sophisticated institutions, whether managed care or employer groups, that have far more ability than individual consumers do to bargain and make well-informed purchasing decisions.

Competition between Butterworth and Blodgett has also resulted, as we detailed in our opening brief (FTC Br. 30), in the hospitals' vigilant pursuit of measures to minimize and reduce costs. Defendants nowhere dispute this point but, like the district court, they give it no weight in their copious speculation about consumer welfare in the post-merger marketplace. By any conventional reckoning, then, competition between Butterworth and Blodgett has worked well in the Grand Rapids marketplace.

B. The Nonprofit Status of the Merging Parties Does Not Support a Conclusion that Eliminating Meaningful Hospital Competition in Grand Rapids Will Benefit Consumers.

"[T]he nonprofit status of the acquiring firm will not, by itself, help a defendant overcome the presumption of illegality that arises from the government's prima facie case," FTC v. University Health, Inc., 938 F.2d at 1224. When the nonprofit defendants in United States v. Rockford, 898 F.2d at 1285 (whose expert witness was Dr. William Lynk), argued that their nonprofit status minimized any ground for concern that they would behave anticompetitively, Judge Posner observed that "[i]f this is correct, the Supreme Court was wrong in National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 100 n.22 (1984), to reject an implicit exemption of nonprofit enterprises from the antitrust laws." Defendants in this case contend, however (Br. 14-15), that by dictum following this statement, Judge Posner invited the hospital industry to prove by "modern methods of multivariate statistical analysis," that increased concentration does not affect competition among hospitals (or nonprofit hospitals).[10] According to defendants, the definitive scholarship sought by Judge Posner has been duly generated (by Dr. Lynk himself) and for this reason, we presume, they feel entitled to ignore the Supreme Court and

[10] Despite inroads by for-profit firms, private or public not-for-profit institutions comprise about 85% of all hospitals in the United States. See "Demise of the Not-for-Profit Has Been Greatly Exaggerated," Modern Healthcare, Dec. 23-30, 1996, at 33. Special antitrust treatment for nonprofits therefore means special antitrust treatment for most of the hospital industry.

appellate caselaw cited in our opening brief (FTC Br. 24) that rejects nonprofit status as a significant reason to validate otherwise anticompetitive mergers.

The caselaw, however, cannot be so lightly cast aside, and Judge Posner's dictum hardly supports the use of it made by defendants.[11] As the numerous briefs in this case reveal, there is no consensus in the scholarly literature regarding the relationship of concentration and competitiveness in hospital markets. While the defendants claim that Dr. Lynk's studies show that increased concentration in nonprofit hospital markets has no effect, or even a positive effect, on prices, the 26 Attorneys General, citing a series of post-Rockford studies, conclude that "[m]ost researchers who have examined data since the rise of managed care have concluded that increased competition yields lower costs and prices," and point to a study of California hospitals concluding that the shift from patient-driven to employer/insurer-driven competition (precisely the shift that is occurring Grand Rapids) had led hospital markets to conform more closely to the standard economic model in which greater competition results in lower prices. (AG Br. 24-25, citing Dranove et al., "Price Concentration in Hospital Markets: The Switch from Patient-Driven to Payor-Driven Competition," 36 J.L. & Econ. 179 (1993); see also Gruber, "The Effect of Competitive Pressure on Charity: Hospital Responses to Price Shopping in California," 13 J. of Health Econ. 183, 204 (1994); Simpson & Shin, "Do Nonprofit Hospitals Exercise Market Power?" FTC Bureau of Economics Working Paper No. 214 (Dec. 1996) at 16 (concluding that

[11] The issue in Rockford, unlike here, was whether a merger that increased concentration but left the merged entity with at least one significant rival, was likely to enhance the remaining competitors' "propensity to collude" or otherwise jointly exercise market power (898 F.2d at 1285). In that context, Judge Posner lamented the necessity for "theoretical guesses as to what particular market-structure characteristics portend for competition" (id. at 1286). Here, the Commission's proof went beyond the "inference * * * from market shares" (id. at 1285) in Rockford to show without question that the merged entity acting alone would have "substantial market power." Judge Posner plainly did not invite the hospital industry and its experts to prove that nonprofit monopolies are good for competition.

"nonprofit hospitals set higher prices when they have more market power")).[12]

With respect to Dr. Lynk's studies, on which the district court exclusively relied, we detailed in our opening brief why his regression analyses described by defendants (Br. 16-18), which do not control for the influencing effect of local wage rates and other costs, are incapable of showing what effect a merger to single-firm market power would have in Grand Rapids. The fact that prices charged in one-hospital rural counties in Michigan (or California) may be lower than prices charged by urban hospitals that face competition, shows only that hospital costs in rural areas are lower than costs in urban areas -- it does not show that creating a hospital monopoly in Grand Rapids (or Lansing or Detroit) would beneficially affect prices. (See FTC Br. 31-33.) Defendants do not address these manifest deficiencies in Dr. Lynk's studies, except to assert that the district court was likewise free to ignore them (Br. 18 n.11).[13] Plainly, however, "radical changes in antitrust policy should not be based on one novel and recently published study" where "the District Court ignored other empirical studies which have reached different conclusions about the relationship between competition and price in hospital markets" (AG Br. 24) and rendered an indefensible interpretation of the evidence before it.

Similarly, defendants' reiteration of the good intentions of Richard DeVos, David Wagner, and other members of defendants' boards (Br. 19-21) cannot be a significant reason to discount the merger's impact. The Commission has never contested the honorable intentions of defendants' leaders. We contest, as does the law, the ability of any firm that faces no serious market rivals

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[12] Defendants observe (Br. 16 n.9) that the Michigan Attorney General has not joined the brief of his many colleagues. Likewise, the Michigan Attorney General has neither filed nor joined an amicus brief in support of the defendants in this matter that has engendered such division within the Grand Rapids community. The Attorneys' General brief, of course, is motivated not by any special concern for the present merger's impact on a Michigan hospital market, but by their concern for the impact of the court's decision on the law and thereby upon competition and the welfare of consumers throughout the country.

[13] Similarly, defendants ignore our explanation of why Dr. Lynk's study of pricing for selected services for Grand Rapids hospitals is inapposite. Compare Br. 19 with FTC Br. 34 n.28.

to replicate the results of competition. Butterworth and Blodgett are large institutions, with a combined net worth exceeding $375 million (R.101 Stip. Facts #54, APX 145). The merged firm would be either the second or third-largest employer in Grand Rapids (id. at #10, APX 139). To insist that such a business would be immune to the ordinary pressures for institutional aggrandizement that affect all businesses defies the caselaw (FTC Br. 24-26) and common sense, to say nothing of the unchallenged evidence cited in our opening brief (FTC Br. 26 n.19), and ignored by defendants. As Mr. Dana Sommers, Chairman of the Grand Rapids Chamber of Commerce put it, "though the merged hospital's board will do what they believe is best for Grand Rapids, they will tend to end up believing that what is best for the hospital is also best for Grand Rapids." PX 144, Sommers Decl. ¶ 7, APX 475.[14]

C. There Is Substantial Customer Opposition to the Merger and Employer Support, Hardly "Overwhelming," Stems from Hostility to Competition

Customer concerns are relevant in antitrust analysis and they support the Commission's case. Payors (managed care and some employers) representing the majority of privately-insured patients in Grand Rapids oppose the merger, because it will lessen competition; those employers who support the merger have done so in significant measure because, like the defendants, they do not believe that competition in health care works.

Managed care providers, who account for at least half of the privately-insured health care consumers in the market, strongly oppose the merger, because they believe it will lead to higher prices by eliminating competition.[15] The district court's contention, echoed by defendants, that

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[14] Mr. Sommers opposed the merger as an individual and local employer; the Chamber of Commerce has taken no position on the merger.

[15] Defendants do not dispute AAHP's observation (AAHP Br. 5-7) that managed care's share of privately insured patients in Grand Rapids is 50% (far more than that of the employers who support the merger) and growing, but note, inappositely, that managed care accounts for fewer hospital inpatient cases than "Medicare and Blue Cross combined" (Br. 22 n.14). However, Blue Cross, while nominally "neutral," is also quite troubled by this merger (II Tr. 204-209 (Zech),

insurers are not appropriate consumer surrogates has been expressly rejected by the Supreme Court, FTC v. Indiana Federation of Dentists, 476 U.S. 447, 463 (1986), and cannot justify the court's rejection of the views of these major health care purchasers.[16] Defendants' attempt to create the impression of "overwhelming[]" (Br. 28), "virtually unanimous" (Br. 22) employer support for the merger runs afoul of the record.[17] Shortly after the merger was announced, Blodgett's CEO reported that the "business community is somewhat against merger. At very least, having trouble reconciling potential advantages with deeper seated beliefs in merits of competition * * * business, esp[ecially] small business, is leery of a health monolith." PX 377 at 260, APX 635. Eventually, the board of HealthCare 2000 voted to support the merger, but this support was sustained only as the result of the hospitals' agreement to make certain immediate

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APX 178-83), and Medicare increasingly relies on managed care approaches to contain costs and is thus also vulnerable to hospitals with market power (III Tr. 91 (Leffler), APX 257).

[16] Dr. Leffler confirmed this fact (R.203 III Tr. 90-94 (Leffler), APX 256-60), contrary to HC2000's claim (HC2000 Br. 5). The court's and defendants' belief that employers have greater and more legitimate concern for hospital costs than managed care providers (because employers allegedly pay for price rises while managed care does not) makes no sense. Employers can and do pass on hospital cost increases to their employees through reduction in salary hikes or other benefits (R.203 III Tr. 93-94 (Leffler), APX 259-60), and to their customers, through higher prices, just as managed care can, within limits, pass on hospital rate increases through premium boosts. But both groups of payors likewise have an "incentive[] to consider the welfare of the patient as well as the minimization of costs," to maintain the value and competitiveness of their own products. FTC v. Indiana Fed'n of Dentists, 476 U.S. at 463.

[17] For record evidence of employer opposition to the merger, see, e.g. R.204 IV Tr. 79 (Gonzalez), APX 327 (recognizing "fair amount" of opposition in Grand Rapids, from many sources, including employers); PX 347, APX 556; R.202 II Tr. 149 (Pries), APX 225; PX 144 ¶ 3 (Sommers), APX 473-74; PX 107 ¶ 2 (Baldwin), APX 433; PX 125 ¶ 7 (Huizenga), APX 440-41; PX 127 ¶¶ 3, 17 (Knape), APX 444, 447. Of the nine employer declarations cited at Br. 28 n.22 to prove "overwhelming" employer support, two are by current members of defendants' boards (and two by former members), four testified that they do not believe in hospital competition [DX 753: Secchia Tr. 8-9, APX 1005-06; DX 704: Bissell Tr. 33 APX 922, DX 767: Young Tr. 8-9, 15-16, APX 1023-26; DX 708: Carioli Decl. p. 1, APX 924 (and one of these did not even support the merger, id. at ¶ 6 (General Motors "could" support the merger "if certain conditions were satisfied")]; two support the merger primarily to preclude Blodgett from building a new facility (DX 703: Batts ¶ 5, APX 918; DX 747: Meijer ¶ 3, APX 997); and the remaining statement is taken out of context (DX 724: Hackett Tr. 21-22, APX 963-64).

pricing concessions -- concessions that may have satisfied a majority of the Healthcare 2000 board but do not necessarily satisfy the majority of the organization's membership, which was never polled to determine its view of the merger and which remains divided (R.203 III Tr. 125, 130-32, APX 278-81(Wm. Kennedy, then-Chairman of HC 2000)).[18]

Most significantly, however, employers who support the merger do so because, like defendants, they do not believe that competition works. As Mr. Kennedy stated at the hearing, "Certainly competition does not work in healthcare" and "I don't think competition has served to decrease cost at all; if anything, it's worked the opposite direction in healthcare." R.203 III Tr. 137-38 (Kennedy), APX 282-83; see also n.17, supra. By contrast, Mr. Sommers, Chairman of the Grand Rapids Chamber of Commerce, opposed the merger because "the free market is the best container of prices in the long run" and "the merger would create[] too big of an entity that would have too much power" which would not be "in the long term, best interests of the community and particularly small employers" (R.201 I Tr. 249-250 (Sommers), APX 185-86).

Purchasers' views (and the reasons for them) are certainly important in a court's assessment of whether a merger's effect "may be substantially to lessen competition." Here, those purchasers who support the merger do so precisely because they believe that competition is bad. Reliance on their opinions is accordingly misplaced. Those knowledgeable health care purchasers who recognize the value of competition overwhelmingly oppose the transaction.

D. The Community Commitment Is No Substitute for Competition

Defendants' heavy reliance on the "Community Commitment" (Br. 24-28) to demonstrate that their merger will not increase prices is likewise misplaced. Assuming (wrongly) that a court

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[18] Mr. Kennedy conceded that he "would have opposed the merger if we were not able to contract, yes." R.203 III Tr. 139 (Kennedy), APX 284. Ironically, Healthcare 2000's ability to secure pricing concessions from Butterworth was a function of its ability to threaten to do business with Blodgett; health care purchasers dissatisfied with Butterworth's post-merger pricing or performance will have no such option.

in a Clayton Act case could lawfully accept the claim that rate regulation is preferable to competition of containing hospital prices, the Community Commitment leaves the defendants with enormous discretion to fix supracompetitive prices.[19]

Defendants' proposed price increase ceilings, even while they last (for seven years), leave room for pricing substantially above competitive levels and leave the hospitals entirely free to resist competitive pressures to reduce prices or to moderate price increases. The Commitment is based on highly questionable assumptions about what prices would prevail in a competitive hospital market in Grand Rapids. For example, defendants cite average price increases for Butterworth and Blodgett (both standard charges and prices paid by managed care plans) over the last seven years to estimate what consumers would pay absent the merger (as compared to what they would pay with the merger, subject to the pricing commitment). But because no one can predict future prices and because hospital price increases generally have been decelerating in recent years, defendants' seven-year averages do not reliably reflect current -- let alone future -- levels of hospital price increases in Grand Rapids. Thus, defendants' proposal to limit price increases to past levels of escalation, when competition might well produce stable or even declining prices, is no bargain. See R.70 "Plaintiff's Response to Defendants' Statement of Actions Planned in the Event of a Merger" at 12-13, APX 116-17.

Defendants' proposed margin limitation (allowing the merged entity to retain profits in the "upper quartile" of those realized in the competitive marketplace) also does little to restrain defendants from pricing above the levels that competition between them would yield, and

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[19] Also, as amicus Consumer Federation of America has pointed out, the manner of the Community Commitment's implementation by the court provides for none of the public input that would accompany even a genuine antitrust consent order, let alone a rate-making proceeding for a public utility, which the post-merger Hospital would most closely resemble. Defendants observe that selected segments of the Grand Rapids community had input into the original commitment (Br. 24 n.17), but as Part II.C. above suggests, the community is quite divided about the wisdom of this merger.

demonstrates the profoundly anticompetitive nature of this transaction. Defendants, like ordinary for-profit firms, desire to realize and maintain high margins, but are unwilling to be disciplined by competition while doing so. Echoing the district court, defendants argue that high margins for a community-based nonprofit entity necessarily benefit consumers, because the nonprofit hospital monopolist can use its excess revenues only to improve the quality of its services (Br. 24). However, even assuming the best intentions and a dedication to efficiency for which firms sheltered from competition are not noted, it remains the case that under the Community Commitment, it will be Butterworth/Blodgett, rather than the marketplace, that decides whether and to what extent its high margins should be spent on price reductions, improvements in quality, or other pursuits that the Hospital considers proper. The defendants' belief that a monolith exercising single-firm market power is better able than the "interaction of competitive forces" to decide "the best allocation of our economic resources" affronts the most fundamental precepts of the antitrust laws. NCAA v. Board of Regents, 468 U.S. at 104 n.27.

E. Neither the Court's Nor Defendants' Efficiencies Discussion Shows that the Merger Would "Benefit Competition and Hence Consumers."

Efficiencies are relevant in merger analysis only insofar as they bear on an assessment of whether a merger is likely to lessen competition. Efficiencies may save a merger if defendants can "demonstrate that * * * [the merger's] economies ultimately would benefit competition and, hence, consumers." FTC v. University Health, Inc., 938 F.2d at 1223. While the district court acknowledged this standard (R.200 Op. 36, APX 68), it made no effort to apply it. The court merely announced, with no explanation, that efficiencies from the merger would be at least $100 million and would benefit consumers, because either the new Hospital would charge lower prices (good for consumers) or the Hospital would not charge lower prices (also good for consumers, because any use the Hospital makes of excess revenues is presumptively good for the community).

The court did not purport to calculate net efficiencies (that is, any cost savings afforded by the merger, minus the consumer benefits foregone by realizing those savings), nor did the court attempt to identify how those efficiencies that it did find would enhance competition.

Defendants' brief fails to remedy these legal deficiencies. Implicitly recognizing that there is no way on the record below to show that their alleged efficiencies will contribute to competition in a post-merger hospital market that is dominated by a single firm, defendants claim that the Commission is estopped from arguing that the alleged efficiencies' effect on competition is the relevant test. But the Commission's position is the same position it took in post-trial briefing to the district court (R.182 "Plaintiff's Post-Trial Brief" at pp. 102-04, APX 160-62 ("the relevant inquiry * * * is whether the alleged efficiencies created by the merger will help promote competition")); the same position taken in University Health and acknowledged by the court here; and, indeed, the only position that can possibly be consistent with the Clayton Act, under which effect on competition is the sole criterion by which a merger may be judged.[20]

Defendants assert that the proper way to measure the impact of efficiencies in a transaction of this nature is to perform a "welfare tradeoff," in which the court weighs the cost-savings generated by the merger against the potential price increases that the accumulation of market

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[20] It is also the standard proposed by the FTC Staff Report, "Anticipating the 21st Century" (DX 1050), on which defendants misplace such great reliance. The report recommends that courts adopt a "competitive dynamics" approach by which "credible efficiencies" would "be evaluated for their contribution to the overall likely competitive effect of the merger" (id. at S-33, APX 1052). This approach "will keep the focus on the proper inquiry -- the merger's probable effect on future competition in the relevant market" (id. at S-34, APX 1053); see also FTC Br. 36 n.30.

Similarly, Section 4 of the Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992), states that "[t]he primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers" (emphasis added). The Guidelines' use of a balancing analysis (stressed by defendants), does not mean that the agencies would excuse an anticompetitive merger if the efficiencies were large enough. The statement in question ("[t]he expected net efficiencies must be greater the more significant are the competitive risks identified in Sections 1-3") means only that in evaluating a merger's net impact on competition, the agencies require a stronger showing of likely procompetitive effects (including efficiencies) where the risk of anticompetitive impact is greater.

power would allow the merged firm to impose. Even if this were a permissible approach in a case that creates single-firm market power (and defendants cite no case in which this has ever been done),[21] the court plainly did not perform the analysis that defendants envision and the court's unexplained assertion that efficiencies would exceed $100 million provides no basis on which such an analysis could possibly be made.[22]

Beyond these fundamental failings, it is also clear, as we argued in our opening brief (FTC Br. 37-42), that the evidence of merger-specific efficiencies in this case is, on the record below, so equivocal that it cannot constitute a defense to creation of a single firm with market power as a matter of law (let alone constitute grounds for denial of preliminary injunctive relief designed to allow careful consideration of such novel claims in an administrative proceeding). Defendants' and AHA's assertion that past overbuilding, declining hospital usage, and resulting overcapacity make it likely that hospital mergers will yield efficiencies (Br. 34-35, AHA Br. 3-8) has little relevance for this merger, in which even the smaller of the two merging entities is three times the size of the average American hospital, and enjoys far above-average occupancy rates and profit margins (see FTC Br. 39 n.33). If Blodgett and Butterworth wish to reduce the number of beds that they staff by a combined total of 200 (Br. 35), they may accomplish this unilaterally, as large

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[21] As we noted in our opening brief (FTC Br. 37), if the alleged efficiencies produced by this merger are passed back to consumers it will only be by virtue of regulated monopoly, not "the interaction of competitive forces" that the Clayton Act is intended to preserve. Thus, this case is totally unlike any in which efficiencies have been treated as a justification for the merger. In such cases (the number is tiny in any event), the alleged efficiencies strengthened the merged firm's ability to compete with significant market rivals and the competition-enhancing effect of the merger therefore outweighed the competition-reducing impact of increased concentration. See, e.g., United States v. Country Lake Foods, Inc., 754 F. Supp. 669 (D. Minn. 1990).

[22] The analysis contained in defendants' own brief is, in any event, incomplete because it fails to take into account, inter alia, offsetting inefficiencies resulting from the elimination of competition between the two hospitals and substantial costs of achieving defendants' asserted efficiencies, such as lower service quality and increased long-range capital requirements for Butterworth's aging facility. If these factors were considered, the net savings from the merger might well be zero.

hospitals routinely do, without merging to monopoly (and without adding rooms to Butterworth, as defendants now plan). Even after the contemplated reductions, Butterworth (now with 529 beds) and Blodgett (now with 328), would be far larger than the average American hospital and far larger than necessary to capture ordinary scale economies. See Vita, Langenfeld, Pautler, and Miller, "Economic Analysis in Health Care Antitrust," 7 J. Con. Health L. & Policy 73, 97 (1991).

Federal antitrust enforcement policy is extremely sensitive to the circumstances of the hospital industry, as reflected by the antitrust agencies' Enforcement Policy on Mergers Among Hospitals, 4 Trade Reg. Rep. (CCH) ¶ 13,153 (1996), at 20,801 (Br., App. 2), and by the small number of antitrust challenges brought against the large number of hospital mergers that have occurred in recent years (id.). This case, however, implicates none of the concerns that should inform antitrust enforcement policy in a downsizing industry, as it involves two very large, highly profitable, and already highly efficient hospitals proposing to consummate a merger that would leave most consumers with only one practical alternative in a market of more than one-half million people.

Defendants argue that the district court's otherwise unexplained assertion that merger efficiencies would exceed $100 million is justified by the court's finding that defendants had hired "multi-disciplinary teams" who toiled in Grand Rapids for four months to produce glossy reports justifying the merger, while the Commission's expert, Dr. Robert Taylor, merely "critiqued" defendants' efforts without visiting Grand Rapids at all (Br. 37). However, defendants bore the burden of proof on efficiencies and the government was entitled to "critique" their attempts to establish the defense.[23] Dr. Taylor testified and submitted two reports (PX 363, APX 558-70;

[23] Dr. Taylor's analysis of efficiencies was found persuasive by the district court in United States v. Mercy Health Services, 902 F. Supp. 968, 987-89 (N.D. Iowa), appeal pending, No. 95-4253 (8th Cir.), and United States v. Rockford Memorial Corp., 717 F. Supp. 1251, 1289-90 (N.D. Ill. 1989), aff'd, 898 F.2d 1278 (7th Cir.), cert. denied, 498 U.S. 920 (1990), notwithstanding

PX 365, APX 571-625) detailing why the hospitals' operating and capital avoidance efficiencies estimates were grossly inflated. The court, without addressing the substance of any of Dr. Taylor's arguments, simply announced that the defendants' case was more persuasive.

The only efficiency even identified by the court (or by the defendants in their brief) is the so-called "capital avoidance" savings that reflects the cost difference between the "large, impressive new facility" (Br. 38) that Blodgett will allegedly build if left to compete, and the cost of adding new inpatient rooms to Butterworth and building a new "outpatient" facility (actually a new hospital with inpatient beds) to serve Blodgett's patients. We believe that defendants have overstated the nature of the facility that Blodgett must or will be allowed to build to compete with Butterworth (see FTC Br. 39-40). But, whatever form the new Blodgett will take, any rational analysis of this "efficiency" must assign some value to the benefits of the hospital that consumers will be denied if the merger occurs.

It is not, of course, our position that "any duplication that results from competition must benefit consumers" or that "no reduction in duplication made possible by a merger could ever be credited as an efficiency" (Br. 39). But what defendants dismiss as wasteful "duplication" (the availability of two full-service hospitals in Michigan's second-largest city) is precisely the type of choice that competition is supposed to provide.[24] If General Motors acquired Ford and phased out all Ford models, citing the court's decision below in support of its claim of multi-billion dollar efficiencies (the amount that would be saved by not having to engage in the periodic competitive

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the fact that he did not visit the hospitals involved in those mergers either.

[24] Some merger savings may have no adverse impact on consumer choice (e.g., having one chief executive officer instead of two), while others may have significant impact on consumers (having one hospital instead of two). The court, however, like defendants, erred by assuming that elimination of the competitive alternative afforded by Blodgett would have no adverse impact on consumers.

retooling, redesigning, restyling, and marketing of the Ford Taurus, Escort, Explorer, and other models), the claim would be laughable. Although the “necessary” automotive needs of American consumers could certainly be satisfied without the Taurus, any court measuring the capital avoidance "savings" from eliminating the Taurus would have to consider the value of having alternatives, as well as the impact that competition with Ford has upon General Motors’ incentives to minimize price and costs and maximize quality. To treat as an unqualified "savings" to be realized by the merger the cost of features that consumers would be willing to pay for, but that a monopolist can withhold because consumers post-merger will have no choice, is indefensible.

If this merger is enjoined, as it should be, the directors of Blodgett will adopt whatever plan they conclude is appropriate to maintain Blodgett as the outstanding, high-quality, efficient, and profitable competitor of Butterworth that it is today. In a market in which payors are increasingly conscious of the bottom line, it is doubtful that Blodgett will build a facility with a spacious atrium, a large parking garage, or private rooms for everyone unless Blodgett concludes that those payors are willing to foot the bill for such features.[25] If Blodgett’s directors should conclude that the marketplace desires and will pay for such a facility, there can have been no justification for defendants to argue, or a court to decide, that these features were simply waste.

As defendants’ brief confirms, there is very little caselaw applying efficiencies’ defenses to uphold otherwise unlawful mergers (and none in which efficiencies have been found to justify a merger creating single-firm market power). When the Supreme Court last addressed the issue, it suggested that efficiencies claims were not cognizable in merger litigation at all. FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967). Our understanding of when mergers harm

[25] The increasing dominance in health-care markets of cost conscious payors (and the virtual disappearance of pure indemnity insurance that reimburses the consumer for any medical expense, no matter how great) belies defendants’ contention that competition produces a "medical arms race" in which the costs of hospital amenities "far exceed their benefits to consumers" (Br. 39). Whatever the validity of that hypothesis in the past, it has long since yielded to the bottom-line concerns of managed care and employers alike. See R.202 II Tr. 97-110 (White), APX 202-15).

or benefit "competition" has evolved since that time, but it is inconceivable that the Court would conclude today that efficiencies such as those claimed by defendants can now justify monopoly.

III. THE COMMISSION'S STRONG SHOWING ON THE MERITS, AS WELL AS THE EQUITIES, WARRANT ENTRY OF A PRELIMINARY INJUNCTION

As we observed in Part IV of our opening brief, this is a particularly compelling case for entry of a preliminary injunction. The Commission's showing of a likely Clayton Act violation is by all conventional caselaw criteria overwhelming (going far beyond a simple statistical, prima facie case, to include a showing of single-firm market power that will be exercised), while the considerations on which the district court relied to find no likelihood of violation implicate highly novel arguments (regarding the behavior of nonprofit firms and the measurement and relevance of efficiencies) for which there is no direct caselaw support. It is difficult to imagine circumstances that would more clearly raise "questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance," R.200 Op. 5, APX 37, citing University Health, Inc., 938 F.2d at 1218.

Defendants' brief strengthens our point. Defendants do not and cannot challenge the district court's conclusion that without question the merger would give Butterworth/Blodgett "substantial market power." Rather, defendants devote the bulk of their brief to their novel nonprofit and efficiencies defenses. As we noted at the beginning, defendants cite no case in which a court has, for any reason, denied relief against a merger between two prospering firms where the court found that the merger would confer market power on the combined entity in one or more properly defined antitrust markets. If this is to be the first such case, then surely the decision should come in the administrative proceeding that will decide the merits (or upon appellate review, under 15 U.S.C. § 21(c), of any Commission decision adverse to defendants.)

Without addressing this argument, defendants suggest that, even if the Commission has shown serious and substantial questions about the merits of the transaction, the "equities" require that injunctive relief be denied because defendants intend to abandon the transaction if preliminarily enjoined, while consumers will reap the benefits of their benevolent monopoly during the FTC's administrative proceeding if no injunction is entered (Br. 42). The law is clear, however, that "[t]he principal equity weighing in favor of issuance of the injunction is the public's interest in effective enforcement of the antitrust laws," FTC v. University Health, Inc., 938 F.2d at 1216. Where the Commission has shown "that it is likely that the proposed acquisition would substantially lessen competition, the [defendants] face a difficult task in justifying the nonissuance of a preliminary injunction," because a decision not to issue the injunction "would frustrate the FTC's ability to protect the public from anticompetitive behavior," University Health, Inc., 938 F.2d at 1225; accord, FTC v. PPG Industries, Inc., 798 F.2d 1500, 1506-07 (D.C. Cir. 1986). The balance of the equities therefore generally follows the merits of the transaction because "[i]f the acquisition seems anticompetitive, then failing to stop it during the administrative proceedings will deprive consumers and suppliers of the benefits of competition pendente lite and perhaps forever, for it is difficult to undo a merger years after it has been consummated." FTC v. Elders Grain, 868 F.2d 901, 904 (7th Cir. 1989).[26]

These concerns are reflected in this case. Defendants have studiously refused to agree that, if allowed to merge pending an administrative proceeding, they will refrain from steps that would make ultimate divestiture impossible. As defendants note, their eventual plan is to build

[26] The district court made no separate evalution of the "equities." (Section 13(b) requires a court to determine whether injunctive relief is in the "public interest" by examining likelihood of success and equities, 15 U.S.C. § 53(b)). After analyzing the Commission's "likelihood of success" at R.200 Op. 40-42, APX 72-74, the court concluded from this alone that the "public interest" weighed against an injunction. Given that the court's "likelihood of success" assessment was erroneous, its derivative "public interest" determination is likewise insupportable and unsupported.

a new 'outpatient' facility (actually, a new hospital with inpatient beds) and add rooms to Butterworth to accommodate Blodgett's patients, and close the existing Blodgett. At some point during this process, restoration of an independent Blodgett via divestiture may well become impossible. Congress enacted Section 13(b) because under existing law there was no adequate mechanism for maintaining the status quo pending administrative determination of a merger's legality, while disaggregation of merged corporate assets after administrative proceedings was often inefficacious. FTC v. Exxon Corp., 636 F.2d 1336, 1342-43 (D.C. Cir. 1980). That concern requires issuance of a preliminary injunction here.[27]

Likewise, withholding injunctive relief would deprive Grand Rapids citizens of the benefits of competition for the duration of the administrative merits proceeding and judicial review. Defendants' contention that the elimination of such competition is actually a benefit upon which the court could rely as an "equity" militating against injunctive relief (even if it not available as a reason for rejecting the Commission's showing of likelihood of success), is plainly wrong. "Circumstances may cause the balance of equities to diverge from the merits * * * but such circumstances were not shown here," FTC v. Elders Grain, Inc., 868 F.2d at 905. If the paramount "public[] interest in effective enforcement of the antitrust laws," FTC v. University Health, 938 F.2d at 1218, is to be respected, the supposed benefit of replacing competition with something "better" can no more be an "equity" militating against preliminary injunctive relief than it can be a reason for finding a merger to be lawful in the first place.

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[27] Defendants' catalog of cases in which the Commission pursued after-the fact divestiture (Br. 43) supports our point. The cases mentioned in Justice Fortas' dissent in FTC v. Dean Foods, 384 U.S. 597, 632 n.17 (1966), took place before Congress enacted the Hart-Scott-Rodino (Pre-Merger Notification) Act, 15 U.S.C. § 18A, in 1976, which was designed to give the government an opportunity to investigate and seek to enjoin mergers before they occurred. In Elders Grain, the parties failed to give required pre-merger notifications and, when detected, merged on a Sunday before the Commission could file for injunctive relief, 868 F.2d at 902-03. Adventist Health System/West, 5 Trade Reg. Rep. (CCH) ¶ 23,591 (FTC Apr. 1, 1994), involved a transaction below pre-merger reporting thresholds, likewise precluding pre-merger challenge.

CONCLUSION

For the foregoing reasons and those set forth in our opening brief, this Court should reverse the decision of the district court and remand this case with directions that the court enter an order preliminarily enjoining the proposed merger of Butterworth and Blodgett hospitals pending either entry of a final order in, or dismissal of, FTC Docket No. 9283.

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January, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 96-2440

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant

v.

BUTTERWORTH HEALTH CORPORATION, a Michigan corporation;
BLODGETT MEMORIAL MEDICAL CENTER, a Michigan corporation,
Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 1997, I have caused two copies of the "Reply Brief for Plaintiff-Appellant Federal Trade Commission" to be served by first-class mail postage prepaid on counsel for Defendants-Appellees below:

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PLAINTIFF'S REPLY DESIGNATION OF APPENDIX CONTENTS
PURSUANT TO 6th CIRCUIT RULE 11(b)

I. OTHER DOCUMENTS

R. 182 "Plaintiff's Post-Trial Brief," pp. 102-04

II. HEARING TRANSCRIPT CITATIONS

Vol. I Tr. 252 (Sommers)

Vol. II Tr. 97-110 (White)
Tr. 149 (Pries)

Vol. III Tr. 90-95 (Leffler)
Tr. 125, 130-32, 137-139 (Kennedy)

Vol. IV Tr. 79 (Gonzalez)

III. EXHIBITS (first page of exhibit and cited pages (or pages with cited paragraphs) only, unless no pages are cited)

PX 107: Baldwin Decl. ¶ 2
PX 125: Huizenga Decl. ¶ 7
PX 127: Knape Decl. ¶ 3
PX 347
PX 365
PX 377, p. 260

DX 703: Batts ¶ 5
DX 704: Bissell Tr. 33, 38
DX 708: Carioli Decl. ¶ 1
DX 724: Hackett Tr. 21
DX 753: Secchia Tr. 8-9
DX 767: Young Tr. 8-9, 15-16